No. 83-118

In the Supreme Court of the United States

OCTOBER TERM, 1983

IRON ARROW HONOR SOCIETY, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the nexus between Iron Arrow Honor Society and the University of Miami is such that the Society's "male only" policies infect the University's federally assisted programs with gender-based discrimination, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statutes and regulations involved	2
Statement	3
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Franks v. *Bowman Transportation Co.*, 424 U.S. 747	12
Grove City College v. *Bell*, 687 F.2d 684, cert. granted, No. 82-792 (Feb. 22, 1983)	16
Linda R.S. v. *Richard D.*, 410 U.S. 614	11
North Haven Board of Education v. *Bell*, 456 U.S. 512	10, 17
Powell v. *McCormack*, 395 U.S. 486	12
St. Paul Fire & Marine Insurance Co. v. *Barry*, 438 U.S. 531	14
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26	11, 15
United States Parole Comm'n v. *Geraghty*, 445 U.S. 388	12
United States v. *W.T. Grant Co.*, 345 U.S. 629	14, 15
Walling v. *Helmerich & Payne*, 323 U.S. 37	14

Constitution, statutes and regulation:

U.S. Const. Art. III	10, 11
Education Amendments of 1972, Title IX, 20 U.S.C. (& Supp. V) 1681 *et seq.*:	
Section 901, 20 U.S.C. 1681	2, 4
Section 901(a), 20 U.S.C. 1681(a)	16
Section 901(a)(6), 20 U.S.C. 1681(a)(6)	5
Section 901(a)(6)(A), 20 U.S.C. 1681(a)(6)(A)	5
Section 902, 20 U.S.C. 1682	2, 4

Constitution, statutes and regulation—Continued Page

34 C.F.R. Part 106 ..... 2, 4
Section 106.31(b)(7) 4, 6, 7, 9, 10, 11

Miscellaneous:

120 Cong. Rec. 39992 (1974) 5
122 Cong. Rec. 13535 (1976) 5
39 Fed. Reg. 22229 (1974) 5
40 Fed. Reg. 24132 (1975) 5
Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363 (1973) 12

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* Petitioners have listed Margaret M. Heckler, Secretary of the Department of Health and Human Services, as respondent in this case. When petitioners filed their complaint, the Department of Health, Education, and Welfare ("HEW") was responsible for enforcing Title IX and the regulations promulgated under that title. That responsibility was transferred to the Department of Education ("ED") by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 678. ED then recodified HEW's regulations at 34 C.F.R. Part 106 without substantive change. Petitioners challenge the enforcement of one of these regulations. Accordingly Secretary Bell, rather than Secretary Heckler, is the proper respondent.

OPINIONS BELOW

The district court's denial of a preliminary injunction on October 30, 1976 (R. 35-36)[1] and its order of dismissal of May 20, 1977 (Pet. App. 101-102) are unreported. The opinion of the court of appeals (Pet. App. 103-105) reversing the district court's order of dismissal is reported at 597 F.2d 590. The opinion of the district court denying a permanent injunction (Pet. App. 62-89) is reported at 499 F. Supp. 496. The opinion of the court of appeals affirming the denial of a permanent injunction (Pet. App. 52-61) is reported at 652 F.2d 445. The order of this Court granting a writ of certiorari, vacating the court of appeals' judgment, and remanding to the court of appeals (Pet. App. 50-51) is reported at 458 U.S. 1102. The opinion of the court of appeals on remand (Pet. App. 1-49), which petitioners now seek review of, is reported at 702 F.2d 549.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. The petition for a writ of certiorari was filed on July 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Sections 901 and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 and 1682, are set forth in relevant part at Pet. 2-4.

2. Relevant Title IX regulations[2] of the Department of Education, 34 C.F.R. Part 106, are set forth at Pet. 4-5.

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[1] "R." refers to the record in the court of appeals.

[2] The Title IX regulations cited in the opinions below and in the petition were those promulgated by HEW in 1975. They were recodified, without substantive change, at 34 C.F.R. Part 106 on May 9, 1980 in connection with the establish-

STATEMENT

1. The Iron Arrow Honor Society was founded in 1926 by the first President of the University of Miami, Dr. Bowman Foster Ashe, to honor the University's most distinguished men. Dr. Ashe gave the Society a charter and signed its Constitution (Pet. App. 92-93). Members of Iron Arrow are selected by the existing membership on the basis of "character and love for Alma Mater, with strong secondary criteria of leadership, scholarship and humility" (Pet. App. 93). Male students, faculty, administrative officials, and alumni of the University are eligible for membership (*ibid.*). It has been the custom for Iron Arrow to hold a "tapping" ceremony twice a year on the University campus. This ceremony, which involves the use of Seminole Indian ritual and costumes, has always taken place on the "tapping mound"—a knoll outside the student union building—where there is an Iron Arrow monument and a plaque declaring Iron Arrow to be "the University's highest honor" (Pet. App. 85, 93). The first "tapping" of the academic year has been part of the annual homecoming festivities and has served as an occasion for reunion and fund raising (Tr. 33-38).[3] The organization has always excluded women.

2. Over the years, the University and Iron Arrow have been intertwined in a variety of tangible and intangible ways. As of 1974, the University's catalog, as well as the Society's brochure, identified Iron Arrow as the University's "highest recognition society for men" (Pet. App. 93). A plaque in the adminis-

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ment of the Department of Education. We will refer throughout to the regulations as now codified.

[3] "Tr." refers to the transcript of the October 30, 1976 hearing on petitioners' motion for a preliminary injunction.

tration building lists all the members of Iron Arrow since its inception (*id.* at 94). Students and faculty have served on screening committees to help select new members, and a faculty member has regularly served as advisor to the Society (*ibid.*)[4] Iron Arrow is also perceived as "the most prestigious organization on campus" (*ibid.*); members of Iron Arrow enjoy, at least in Florida, some advantage in the employment market (Tr. 8-11).

3. In 1972, Congress passed Title IX of the Education Amendments, which provides that (20 U.S.C. 1681)

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Compliance may be enforced by termination of federal financial assistance, but termination must be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been * * * found" (20 U.S.C. 1682).

Pursuant to Section 902 of the Act (20 U.S.C. 1682), HEW promulgated the regulations now appearing at 34 C.F.R. Part 106. Section 106.31(b)(7) provides that:

> [A] recipient shall not, on the basis of sex:
>
> * * * * *

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[4] It is undisputed that some services—such as secretarial work, printing, and mailing—previously rendered by either the Student Union or the Alumni organization, were discontinued between 1973 and the time this suit was brought (R. 4-5).

> (7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees * * *.

In its notice of proposed rulemaking HEW explained that the regulation applied to "official institutional sanction of a professional or social organization" whose activities "relate so closely to the recipient's educational program or activity * * * that they fairly should be considered as activities of the recipient itself" (39 Fed. Reg. 22229 (1974)). In its notice of final rulemaking in 1975 HEW further clarified the regulation (40 Fed. Reg. 24132 (1975)):[5]

> [S]uch forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

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[5] Before HEW's final rulemaking was published, Congress amended Title IX to exclude from coverage purely social campus fraternities and sororities (20 U.S.C. 1681(a)(6)(A)). According to Senator Bayh, sponsor of the amendment (120 Cong. Rec. 39992 (1974)):

> this exemption covers only social Greek organizations; it does not apply to professional fraternities or sororities whose admissions practices might have a dicriminatory effect upon the future career opportunities of a woman.

Although petitioners quote Section 901(a)(6) (Pet. 2, 6), they do not argue that the regulation at issue in this case is inconsistent with it. See also 122 Cong. Rec. 13535 (1976) (remarks of Rep. Mathis) (honorary societies subject to Title IX).

4. Early in 1973, HEW's Atlanta regional civil rights office received a complaint about Iron Arrow's policies concerning women and began an investigation. No action was taken against the University, however, until after HEW had published its Title IX regulatory guidelines. On May 24, 1976 an HEW regional official wrote to the University's president, informing him that the University was rendering significant assistance to Iron Arrow in violation of 34 C.F.R. 106.31(b)(7). He asked the University to take steps either to induce a change in Iron Arrow's policy of excluding women or to dissociate itself from the Society (Pet. App. 95).

The Executive Committee of the University's Board resolved to comply with the HEW request, and so notified Iron Arrow (Tr. 75-80) and HEW (Pet. App. 98-100). On October 8, 1976, HEW agreed to a request by the University's president for more time to negotiate with Iron Arrow, but insisted that the University dissociate itself from Iron Arrow to the extent of banning "Society functions [on campus] such as tapping * * * until the question of the University's compliance is resolved" (Complaint Exh. 6). The University did so (Pet. App. 73).

5. Petitioners then brought this suit on October 21, 1976 (R. 1) against the Secretary of HEW, the appropriate regional official, and the University of Miami. They asked the district court to enjoin the University from barring Iron Arrow's fall 1976 "tapping" ceremonies on the campus (Pet. App. 68, 73; R. 11). They also sought a declaration of their rights with regard to HEW's interpretation of Title IX and its implementing regulations, and an injunction preventing HEW from requiring the University to bar Iron Arrow from campus on account of its policy of

admitting only men (Pet. App. 68). The district court denied petitioners' motion for a preliminary injunction to assure that the fall "tapping" would continue as scheduled (*ibid.*).[6] In May, 1977 the district court dismissed the case, concluding that Iron Arrow had no standing to sue HEW, and "no federal cause of action against the university" (Pet. App. 101-102). The court of appeals affirmed the district court's dismissal as to the University, but reinstated the claim against HEW "[i]n light of the unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare it would not have barred and would not in the future bar the Iron Arrow Honor Society from its campus" (Pet. App. 104-105).[7]

6. The district court then heard the case on cross-motions for summary judgment, and on August 12, 1980, denied Iron Arrow any relief (Pet. App. 62-89). The court held that HEW's regulation (now 34 C.F.R. 106.3(b)(7)), "though it may reach activities once-removed from direct federal assistance, is nevertheless useful and necessary to the effectuation of 20 U.S.C. § 1681" (Pet. App. 80). Since Iron Arrow and the University were historically interdependent (*id.* at 83-86), the court concluded, HEW had correctly applied its regulation here (*id.* at 89).

7. The court of appeals affirmed (Pet. App. 52-61). Iron Arrow's petition for a writ of certiorari

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[6] Petitioners filed a notice of appeal, but took a voluntary dismissal when the court of appeals denied their request for a stay (R. 32, 46-47).

[7] The corrected mandate affirming the dismissal as to the University, dated August 13, 1979, appears at R. 129. On June 24, 1980 the district court again joined the University as a party in order to ensure complete relief (R. 137).

was granted, and this Court vacated and remanded the case to the court of appeals "for further consideration in light of *North Haven Board of Education* v. *Bell*, 456 U.S. [512] (1982)" (Pet. App. 51).

8. On remand, the Department filed a Suggestion of Mootness and Motion for Remand,[8] calling the court of appeals' attention to a letter dated September 23, 1982, from the President of the University of Miami to the Chief of the Iron Arrow Honor Society. The letter informed Iron Arrow that, regardless of the outcome of this litigation, it must admit women if it is to return to campus.[9] The letter stated (App., *infra*, 2a-3a):

> No purpose would be served by summarizing in this letter the years of controversy leading to the removal of Iron Arrow from the campus. You will recall, however, that before my time here the Board of Trustees of the University adopted a resolution requiring that Iron Arrow comply with generally applicable nondiscrimination policies if the organization were to return to the campus. The University's position has not changed. I agree with it. I continue to believe, as I have told you and others, that Iron Arrow should not exclude women from membership if it is to become again a campus organization.
>
> Attention has focused most recently on the legal issues involved, because of the litigation. Those issues are important to the parties, I do understand, and a long time may pass before they are resolved.

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[8] A copy of the Suggestion has been lodged with the Clerk of this Court.

[9] A copy of the letter is reproduced at App., *infra*.

> But there are other issues, the central one being how policies and practices of the University of Miami affect its students, student organizations and all others concerned. The question is not only what the law requires. The question is what our University *should* do, in fairness to all students, whether the law requires it or not.

The Department accordingly suggested that the judgment be vacated and the case remanded to the district court for the limited purpose of making a determination of mootness.

The court of appeals rejected this contention (Pet. App. 9-12). The court went on to hold that 34 C.F.R. 106.31(b)(7) was consistent with Title IX and applicable to the University, which rendered "significant assistance" to Iron Arrow (Pet. App. 17-41). Although Iron Arrow received no direct federal assistance, the Court found it so intimately connected to the University that its discriminatory policy could fairly be attributed to the University (Pet. App. 41). Moreover, because discriminatory exclusion of women by a "recognition" society would infect the entire academic mission of the University (Pet. App. 17, 33), it would necessarily affect any programs or activities receiving federal financial assistance (*id.* at 18).[10] Accordingly, the court held, HEW (and the Department of Education) had correctly interpreted Title IX to require dissociation between the University and the Iron Arrow Honor Society.

Judge Roney (Pet. App. 42-49), dissenting, would have remanded the case to the district court for consideration of the question of mootness. His opinion did not address the merits.

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[10] The court noted that "[t]he University of Miami received $46,000,000 of federal funds in 1980, in the form of contracts, grants, and student assistance" (Pet. App. 7).

ARGUMENT

The substantive issues in this case are whether the Department's regulation (34 C.F.R. 106.31(b)(7)), properly interpreted, forbids University assistance to Iron Arrow; and whether the regulation, if so interpreted, is consistent with Title IX. When this Court remanded the case for reconsideration in light of *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982), the Department suggested to the court of appeals that "*North Haven* casts considerable doubt" on the outcome of those questions "by holding that the validity of regulations promulgated under Title IX depends on 'the program-specific limitation of §§ 901 and 902' " (Pet. App. 47). Petitioners urge that the court of appeals improperly resolved that doubt when it held the "significant assistance" regulation both valid and applicable to this case. We believe, for the reasons set forth below, that further review of the merits of this case is not warranted.

1. The court of appeals erred in concluding the case was not moot. The University has decided that, "whether the law requires it or not," Iron Arrow may not return to the campus unless it will adhere to the school's "generally applicable nondiscrimination policies" (App., *infra*, 2a, 3a). Thus whatever the outcome of this case may be, Iron Arrow will not get the only relief it requested in its complaint: the right to conduct its "tapping" ceremonies on campus (R. 8-9, 11).

a. One element of the Article III case or controversy requirement is that a litigant must have a "personal stake" in the outcome of the litigation. To satisfy this requirement, a litigant must demonstrate not only that he has suffered some personal injury, but also that the injury "fairly can be traced to the

challenged action" and "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976); *Linda R. S.* v. *Richard D.*, 410 U.S 614, 617-618 (1973).

In *Simon*, indigent plaintiffs challenged an Internal Revenue Service ("IRS") ruling giving favorable tax treatment to hospitals that provided only emergency room service to indigents. This Court accepted the plaintiffs' allegation that they had been denied services by the hospitals. 426 U.S. at 41. It held, however, that this allegation was insufficient to establish a justiciable controversy between the plaintiffs and the IRS (*ibid.*). The Court explained that it was "purely speculative" whether plaintiffs' injuries could be traced to the IRS ruling or instead resulted from independent decisions made by the hospitals (426 U.S. at 42-43). The Court further explained that it was "equally speculative" whether relief against the IRS would result in the availability of service for the plaintiffs, or whether the hospitals would instead elect to forego favorable tax treatment (*id.* at 43).

In *Linda R. S.*, the mother of an illegitimate child sued the state attorney general to require him to enforce a criminal child support statute against the child's father. The Court held that the mother had failed to satisfy Article III requirements, since she had made no showing that her failure to receive support payments resulted from nonenforcement of the statute rather than the father's unwillingness to pay. The Court concluded that for that reason it was purely speculative whether the requested prosecution would result in the payment of child support (410 U.S. at 618).

Simon and *Linda R. S.* both dealt with the personal stake requirement at the outset of the litigation, and

therefore addressed the question as one of the plaintiffs' standing to sue. But this same threshold requirement must be satisfied at all stages of the litigation. *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976); *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). When a litigant loses his personal stake in the outcome of the litigation, the case becomes moot (*ibid.*). Put simply, mootness is " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Comm'n*, *supra*, 445 U.S. at 397, quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973).

In the first appeal of this case the Fifth Circuit held that Iron Arrow had a personal stake in the litigation. Iron Arrow's inability to "tap" on campus constituted injury in fact. The University had stated that its decision to expel Iron Arrow from campus was based entirely on HEW's threat of enforcement, and that absent this threat the University would permit Iron Arrow to return to campus. The court of appeals concluded—in light of that statement—that Iron Arrow's injury could fairly be traced to HEW's conduct, and would likely be redressed by a favorable decision (Pet. App. 104-105).

Since then, however, the University's position appears to have changed. The September 23, 1982 letter from the President of the University to Iron Arrow announces "the policy adopted by the Trustee Executive Committee on July 15, 1980 * * * [:] that Iron Arrow may only return to campus if it meets the code for student organizations, which in-

cludes a policy of non-discrimination" (Pet. App. 9). This letter makes clear that, "whether the law requires it or not," the University will not permit Iron Arrow to return to campus unless it agrees to admit women (App., *infra*, 3a). If that is the University's position, no relief petitioners can secure in this case will redress the injury they complain of, and any opinion this Court might deliver would be purely advisory.

b. The court of appeals rejected the Department's mootness suggestion, arguing that the Department might insist upon a cleaner break between the University and Iron Arrow than the University's own policies would require (Pet. App. 10). The court suggested, for example, that the Department might require the University to revoke the charter given to Iron Arrow, or to prohibit Iron Arrow from using the University's name (*ibid.*). But it is not easy to see how any of this bears on the mootness of *this* case. In this case, the dispute is about the Department's demand that Iron Arrow be prevented from "tapping" on campus; and the only relief Iron Arrow sought was the right to "tap" on campus. (In fact the complaint disavowed any claim to other support from the University.[11]) The Department is not now demanding that the University take the further steps to disestablish Iron Arrow mentioned by the court of appeals, and Iron Arrow has not asked the courts to prevent any such demands. In sum, there is no *existing* dispute between the Department and Iron Arrow with respect to any issue other than Iron Arrow's insistence that it be allowed to return "tapping" to campus. *That* issue is moot because the University is deter-

[11] "[T]he Plaintiff could 'move all activities off campus yet retain identical prestige in the community' with the exception of the tapping (selection) ceremony" (R. 5).

mined to forbid on-campus "tapping" no matter what happens in this litigation; *that* issue is not transformed into a live issue just because a court of appeals can conjure up other, theoretical, steps that could be taken in disestablishing Iron Arrow—steps that no one is now asking the University to take and that plaintiffs in this suit have not sought to prevent.

The court of appeals also suggested that the University's policy may change again, and thus revive the controversy (Pet. App. 11-12). The court pointed to "[a] long line of Supreme Court cases" demonstrating that " '[v]oluntary discontinuance of an * * * illegal activity does not operate to remove a case from the ambit of judicial power' " (*id.* at 11, quoting *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944)). Those cases, however, are simply irrelevant to the issue here. See *id.* at 48 (Roney, J., dissenting). It is true that this Court has been properly skeptical when a *defendant* voluntarily stops doing what the plaintiff complains of, and then asserts that the case is moot. After all, a dismissal under those circumstances would simply leave "[t]he defendant * * * free to return to his old ways." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).[12] But here the Department's assertion of mootness rests on the fact that a *third party*—the University—has said

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[12] In one of the cases cited by the court of appeals, *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 537-538 (1978), the issue of mootness involved action by a third party. The State of Rhode Island there had formed a Joint Underwriting Association to provide malpractice insurance—an action that may have mooted respondents' claim of a boycott by the petitioners, who were insurers. This Court concluded that the case was not moot because the State "permit[ted] the writing of medical malpractice insurance outside of the JUA," and because petitioners acknowledged " 'that the alleged antitrust violations could recur in the future.' " 438 U.S. at 538.

it will keep Iron Arrow off campus "whether the law requires it or not" (App., *infra*, 3a).[13] Petitioners have offered no reason to believe that the University does not mean exactly what it says; there is no basis for the speculation that the University might amend its nondiscrimination policy in favor of Iron Arrow. "[T]he mere possibility" that that might occur cannot "serve[] to keep the case alive." *United States* v. *W. T. Grant, Co., supra*, 345 U.S. at 633.[14]

c. Because the University's position came to light while the case was on appeal (and also because the court's conclusion about mootness rested on assumptions about further demands the University and the Department might make on Iron Arrow), the court of appeals should have remanded the case to the district court for confirmation or clarification of those factual issues. Since the case is clearly moot if petitioners' claim of injury cannot "be redressed by a favorable decision" (*Simon* v. *Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 38), this Court may wish to consider granting the petition for the limited purpose of vacating the judgment of the court of appeals and directing a remand to the district court to consider the issue of mootness. In any event the presence of a substantial jurisdictional im-

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[13] As a technical matter, the University has been joined as a defendant in this case "solely for the purpose of enforcing [the district] Court's Order in accordance with the University's pleadings" (R. 137). Petitioners have asserted only that the Department cannot force the University to sever its ties with Iron Arrow. They have no claim against similar action taken by the University on its own initiative.

[14] If speculation about a third party's future behavior is sufficient to revive this controversy, it is hard to see why it should not also have sufficed to confer standing in *Simon* and *Linda R.S.*

pediment to consideration of the merits of the petition strongly counsels against plenary review.

2. Petitioners suggest that (Pet. 20)

> [this] case should be considered along with *Grove City College* as this Court resolves the conflict between the Circuits on the key issue of interpretation of Title IX. This case presents the "program-specificity" issue in the context of outside student organizations rather than student loans.

It is true, as we noted above (page 10), that this case involves a question about the consistency of 34 C.F.R. 106.31(b)(7) with the program-specific limitation of Title IX. But that issue is different from the questions presented in *Grove City College* v. *Bell*, cert. granted, No. 82-792 (Feb. 22, 1983). The principal issue in *Grove City* is whether a college is a "recipient" of "Federal financial assistance" under Title IX (20 U.S.C. 1681(a)) when the only federal money flowing to the school is federal student aid. In this case, by contrast, "[t]he University of Miami received $46,000,000 of federal funds in 1980, in the form of contracts, grants, and student assistance" (Pet. App. 7 note 2).

The other relevant issue in *Grove City* concerns the proper definition of the "program or activity" assisted by federal student aid grants. The Third Circuit in that case found that the entire institution was a covered program. *Grove City College* v. *Bell*, 687 F.2d 684, 700 (3d Cir. 1982). But here the court of appeals stated (Pet. App. 39-41):

> [W]e do not rely on what [have] come to be known as the * * * "institution as program" cases. * * * [Those] cases focus on the definition of "program" or "recipient" and hold that the en-

> tire educational institution may be defined as the program receiving federal assistance for the purposes of Title IX. * * * We note the * * * distinction * * * between the statement that an educational program may be *defined* as an educational institution for purposes of Title IX and * * * our holding * * * that Iron Arrow's practices * * * are *attributable* to the University itself.

The propriety of invoking this "infection" theory (that discrimination elsewhere in a university can "infect" programs covered by Title IX) in some circumstances may be contemplated by this Court's decision in *North Haven*, *supra*, 456 U.S. at 540 ("Neither school board opposed HEW's investigation * * * on the grounds * * * that the discrimination they allegedly suffered did not affect a federally funded program."). But as we noted in our brief in *Grove City*, the validity of various applications of that theory is "not a matter that the Court need reach in this case" (82-792 Resp. Br. 20 n.25).[15]

The pendency of *Grove City College* v. *Bell* is thus not a reason for granting the petition here, particularly since ~~there is a substantial likelihood that~~ this case appears to be moot.

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[15] We have sent a copy of our brief in *Grove City* to counsel for petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for a hearing by the district court on the question of mootness. Alternatively the petition should be denied.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX

University of Miami
Coral Gables, Florida 33124
OFFICE OF THE PRESIDENT
P.O. Box 248006 (305) 284-5155

September 23, 1982

Mr. C. Rhea Warren
Chief
Iron Arrow Honor Society
7310 S. W. 19th Terrace
Miami, Florida 33155

Dear Mr. Warren:

Please recall our visit during my first few months here when you and your associates told me something of the history of the Iron Arrow Honor Society and the events leading to the case of *Iron Arrow Honor Society vs. the Secretary of the Department of Health and Human Services*, then on the way to the Supreme Court of the United States.

I shared then, and I still do, your view that Iron Arrow has been an important institution at the University of Miami. Healthy traditions, like those of a respected honor society, are great assets to any university. They are especially important to a younger university like ours. I regretted deeply, therefore, and I still do, that events of the last few years have estranged Iron Arrow from the campus, and especially from the undergraduate student body.

Since our visit, many others, including members of Iron Arrow, have talked to me about the past and future of the organization. I have thought a lot about it. It appeared, however, that so long as the case remained in the Supreme Court, further efforts to re-

solve differences between University policy and the Iron Arrow practice of limiting membership to men were premature; too many key people seemed too determined to await the Supreme Court's decision.

Since that decision during the summer, many members of Iron Arrow, including undergraduates, again have shared their views with me. You and your associates, of course, will decide what the Iron Arrow legal position should be so long as the litigation continues. Indeed, earlier this week as I was writing this letter, I received from your lawyers another brief. Although the case could remain in the courts for years longer, it seems time to try again to resolve existing differences.

No purpose would be served by summarizing in this letter the years of controversy leading to the removal of Iron Arrow from the campus. You will recall, however, that before my time here the Board of Trustees of the University adopted a resolution requiring that Iron Arrow comply with generally applicable nondiscrimination policies if the organization were to return to the campus. The University's position has not changed. I agree with it. I continue to believe, as I have told you and others, that Iron Arrow should not exclude women from membership if it is to become again a campus organization.

Attention has focused most recently on the legal issues involved, because of the litigation. Those issues are important to the parties, I do understand, and a long time may pass before they are resolved.

But there are other issues, the central one being how policies and practices of the University of Miami affect its students, student organizations and all others concerned. The question is not only what the law requires. The most important question is what our

University *should* do, in fairness to all students, whether the law requires it or not.

Whatever legitimate cause there may be to distinguish between men and women in other organizations for different reasons, they do not apply to the criteria for membership as stated in the original charter of Iron Arrow:

> In order to associate University of Miami faculty and students possessing talent in their chosen fields and demonstrated qualities of leadership, truth and energy in extra-curricular activities into a more intimately organized unit of good fellowship, and in order to assist the members in acquiring the noblest principles of mankind, and in order to advance the standards of the University of Miami by fostering a higher ethical code, thus increasing its value as an uplifting social agency, we do hereby establish and ordain this Constitution of Iron Arrow.

Iron Arrow is not like a private association among people who wish to be together. It has been a University-sponsored organization that has existed to recognize the accomplishment of students. From its earliest days, the University had supported Iron Arrow, from providing space to allowing the interruption of classes.

Times change. The 1980s are not the 1920s when the University and Iron Arrow began. Regardless of laws or customs of the past, it is time, I respectfully urge, that Iron Arrow change its policy of limiting membership to men only.

To avoid any ambiguity that might be present because of the passage of time or change of University administrations, I have instructed counsel for the

University to inform the Courts of the University's policy.

I would welcome an opportunity to meet with you, other Iron Arrow officers, graduate and undergraduate, and anyone else you might suggest. Perhaps a general meeting of the membership would be appropriate. Because of the interest of many in the future of Iron Arrow, rekindled now by the Supreme Court decision, I am making a copy of this letter public and sending copies specifically to your undergraduate members.

Cordially,

/s/ Edward T. Foote II
EDWARD T. FOOTE II
President

ETF:ac

cc: Board of Trustees
Undergraduate Students

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